

A ALL NIPPON AIRWAYS CO LTD
v.
TOKAI MARINE & TRADING CO LTD

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ALIZATUL KHAIR OSMAN JCA
MOHTARUDIN BAKI JCA
C [CIVIL APPEAL NO. W-04-117-2011]
22 JUNE 2012

CARRIAGE BY AIR AND LAND: *International carriage - Liability of carrier - Damage caused to respondent's goods - Cargo under care and control of appellant's agent - Respondent sent notice of intention to claim damages - Whether Carriage By Air Act 1974 read with Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) applied to facts - Whether appellant or its agent had caused damage - Whether respondent had right to issue notice of intention - Whether there was limit to carriers' liability*

E MAS Kargo, ie, the appellant's ('defendant') ground handling agent, had received 30 cartons of fresh tuna ('the cargo') from the respondent ('plaintiff') in good condition. The cargo was under the care and control of the defendant's agent. However, 20 cartons were crushed and damaged and were unfit for human consumption. As a result, the plaintiff could only bill its consignee in Japan for the ten intact cartons. Pursuant to art. 26 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended at the Hague 1955 ('the Warsaw Convention'), the plaintiff sent a notice of intention ('the notice') to the defendant to claim for damages. This led to the plaintiff's action against the defendant in the Sessions Court where the plaintiff obtained judgment against the defendant in the sum of RM198,144.16. On appeal, the learned Judicial Commissioner ('JC') had affirmed the Sessions Court's judgment. Dissatisfied with the said decision, the defendant appealed to this court. The questions that arose for consideration were: (i) does the Carriage By Air Act 1974 ('the said Act') read with the Warsaw Convention apply to the facts herein, to the exclusion of common law, more specifically common law causes of action ('the first question'); (ii) whether the defendant or its agent had caused the damage to the damaged cargo ('second question'); (iii) whether the plaintiff had the right to issue the notice ('third

question’); and (iv) upon a true construction of art. 22(2)(a) of the Warsaw Convention read with the Carriage By Air (Ringgit Equivalent) Order 1978, was the plaintiff’s claim limited to RM48 per kg (‘fourth question’). A

Held (allowing appeal in part)

Per Low Hop Bing JCA delivering the judgment of the court: B

- (1) In relation to the transaction herein, the governing law was the said Act read with the Warsaw Convention which has been incorporated as the First Schedule thereto. The Warsaw Convention has the force of law under s. 3(1) of the said Act. The carriage of the cargo from KLIA to Japan was an international carriage by air within the definition of art. 1(2) of the Warsaw Convention. By virtue of s. 3(1), the provisions of the international law contained in the Warsaw Convention shall regulate the rights and liabilities of the plaintiff and defendant. The carriage comprises the journey during which the cargo was delivered to the defendant’s agent for upliftment on board the defendant’s flight until its arrival at the destination to which the cargo was intended, *ie*, Japan. (paras 9 & 10) C D E
- (2) In any carriage by air, the provisions of the Act read with the Warsaw Convention govern the transaction in question, to the exclusion of and without reference to the rules of the local law and common law, more specifically common law causes of action. Hence, the answer to the first question was in the affirmative. (para 14) F
- (3) The facts plainly pointed to the defendant’s responsibility for the damage. In the absence of any failure on the part of the learned trial judge relating to the judicial appreciation of the evidence adduced at the trial, or any indication that the trial court had acted against the weight of evidence, this court was not inclined and would indeed decline to disturb that finding of facts. Hence, the answer to the second question was in the affirmative. (paras 15 & 16) G H
- (4) In the context of the carriage by air in the instant appeal, the person who must complain to the carrier is the person entitled to delivery. This person who is entitled to delivery is the person who is entitled to lodge the complaint. Such person who had sustained loss, injury or damage as a result of the delivery of the damaged cargo must perforce be an aggrieved I

- A person. On the facts, the plaintiff had sustained loss and hence, was an aggrieved person since the plaintiff could only bill the consignee in Japan for ten intact cartons instead of the entire 30 cartons. The plaintiff's loss arising from the damaged cargo gave rise to the plaintiff's entitlement to complain and issue the notice under art. 26(2) of the Warsaw Convention. Hence, the answer to the third question was in the affirmative. (para 17)
- B
- (5) The defendant's liability as a carrier was governed by art. 22(2)(a) of the Warsaw Convention whereby in the case of the carriage of registered cargo, the carrier's liability was limited to a sum of 250 francs per kg unless the consignor has made, at the time when the consignment was handed over to the carrier, a special declaration of interest in delivery at destination and had paid a supplementary sum if the case so requires. In the absence of a special declaration of interest in delivery at destination under art. 22(2)(a) of the Warsaw Convention, there was no basis to invoke the second limb thereof which provides for an exception to the general rule governing the limit of the carrier's liability under art. 22(2)(a). (paras 21 & 22)
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- E
- (6) Under the Carriage By Air (Ringgit Equivalent) Order 1978, the sum of 250 francs per kg had been fixed at RM48. Under art. 22(2)(a) of the Warsaw Convention, the defendant's liability was limited to the sum of RM110,400 only in respect of the cargo weighing 2,300 kg. The learned JC had erred in omitting to consider or invoke art. 22(2)(a) of the Warsaw Convention and had erred in affirming the sum of RM198,144.16 awarded by the Sessions Court. This omission to invoke art. 22(2)(a) was a non-direction amounting to a misdirection, thereby occasioning a miscarriage of justice warranting appellate intervention. In light of this, the order of the High Court was substituted with a sum of RM110,400. Hence, the answer to the fourth question was in the affirmative. (paras 25, 26 & 27)
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Bahasa Malaysia Translation Of Headnotes

- I MAS Kargo, agen pengendalian darat perayu ('defendan') telah menerima 30 kanton tuna segar ('kanton') daripada responden ('plaintif') dalam keadaan baik. Kargo berada dalam jagaan dan kawalan agen defendan. Walau bagaimanapun, 20 kanton telah hancur dan rosak dan ianya tidak sesuai untuk penggunaan

manusia. Sebagai akibatnya, plaintif hanya boleh mengenakan bayaran kepada penerima konsain di Jepun bagi sepuluh kanton yang tidak rosak. Menurut perkara 26 Konvensyen untuk Penyatuan Peraturan Tertentu Berkaitan dengan Pengangkutan Udara Antarabangsa seperti dipinda di Hague 1995 ('Konvensyen Warsaw'), plaintif telah menghantar satu notis niat ('notis') kepada defendan untuk menuntut ganti rugi. Ini menyebabkan plaintif mengambil tindakan terhadap defendan di Mahkamah Sesyen di mana plaintif telah mendapat penghakiman bagi jumlah RM198,144.16. Atas rayuan, Yang Arif Pesuruhjaya Kehakiman ('PK') telah mengesahkan keputusan Mahkamah Sesyen. Tidak puas hati dengan keputusan tersebut, defendan telah merayu ke mahkamah ini. Persoalan-persoalan yang dibangkitkan untuk pertimbangan adalah: (i) sama ada Akta Pengangkutan Melalui Udara 1974 ('Akta tersebut') dibaca dengan Konvensyen Warsaw terpakai kepada fakta kes di sini dengan pengecualian common law, secara lebih spesifik iaitu kausa tindakan common law ('soalan pertama'); (ii) sama ada defendan atau agennya telah menyebabkan kerosakkan kargo ('soalan kedua'); (iii) sama ada plaintif mempunyai hak untuk mengeluarkan notis ('soalan ketiga') dan (iv) atas pentafsiran peraturan 22(2)(a) Konvensyen Warsaw dibaca dengan Perintah Pengangkutan Melalui Udara (Persenilaian Ringgit) 1978, adakah tuntutan plaintif terhad kepada RM48 bagi satu kg ('soalan keempat').

Diputuskan (membenarkan rayuan sebahagiannya)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

- (1) Berkenaan transaksi di sini, undang-undang yang mengawal adalah Akta tersebut dibaca dengan Konvensyen Warsaw yang telah dimasukkan sebagai Jadual Pertama di dalamnya. Konvensyen Warsaw mempunyai penguatkuasaan undang-undang di bawah s. 3(1) Akta tersebut. Pengangkutan kargo dari KLIA ke Jepun adalah pengangkutan antarabangsa melalui udara berikutan perkara 1(2) Konvensyen Warsaw. Menurut s. 3(1) Akta, peruntukan undang-undang antarabangsa yang terkandung dalam Konvensyen Warsaw akan mengawal hak dan liabiliti terhadap plaintif dan defendan. Pengangkutan merangkumi perjalanan di mana kargo dihantar kepada agen defendan bagi mengangkut ke dalam penerbangan defendan sehingga ketibaan di destinasi yang diinginkan, iaitu negara Jepun.

- A (2) Dalam sebarang pengangkutan melalui udara, peruntukan Akta tersebut dibaca dengan Konvensyen Warsaw mengawal transaksi di sini, dengan pengecualian dan tanpa merujuk kepada peraturan-peraturan perundangan tempatan dan common law, lebih spesifiknya terhadap kausa tindakan common law. Oleh itu, soalan pertama dijawab secara afirmatif.
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- C (3) Fakta jelas menunjukkan tanggungjawab defendan terhadap kerosakan. Dalam ketidakhadiran sebarang kegagalan dari yang arif hakim perbicaraan berkenaan penghargaan kehakiman bagi keterangan yang dikemukakan semasa perbicaraan atau pun sebarang petunjuk bahawa mahkamah perbicaraan telah bertindak terhadap beban keterangan, mahkamah ini tidak cenderung dan tidak akan mengganggu dapatan fakta itu. Oleh itu, soalan kedua dijawab secara afirmatif.
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- E (4) Dalam konteks pengangkutan melalui udara dalam rayuan di sini, seseorang yang boleh membuat aduan kepada pengangkut adalah layak untuk penghantaran. Orang tersebut yang layak untuk penghantaran adalah layak untuk membuat aduan. Orang sebegitu yang telah mengalami kerugian atau kerosakan akibat penghantaran kargo yang rosak adalah seorang yang terkilan. Berdasarkan fakta, plaintif telah mengalami kerugian dan oleh itu, adalah pihak terkilan memandangkan plaintif hanya boleh menuntut bayaran daripada penerima konsain di Jepun bagi sepuluh karton yang tidak rosak berbanding dengan keseluruhan 30 karton. Kerugian plaintif berbangkit daripada kargo rosak yang menyebabkan kelayakan plaintif untuk mengadu dan mengeluarkan notis di bawah perkara 26(2). Oleh itu, soalan ketiga dijawab secara afirmatif.
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- G (5) Liabiliti defendan sebagai pengangkut dikawal oleh perkara 22(2)(a) Konvensyen Warsaw di mana dalam kes pengangkutan kargo berdaftar, liabiliti kargo adalah terhad kepada jumlah 250 francs bagi satu kg kecuali jika pemberi konsain telah membuat, pada masa konsain diserahkan kepada pengangkut, satu deklarasi khas kepentingan dalam penghantaran ke destinasi dan telah dibayar lebih jika kes memerlukannya. Tanpa kehadiran deklarasi khas kepentingan penghantaran ke destinasi di bawah perkara 22(2)(a) Konvensyen Warsaw, maka tidak terdapat asas untuk membangkitkan cabang kedua yang memperuntukkan suatu pengecualian terhadap peraturan am yang mengawal had liabiliti pengangkut di bawah peraturan 22(2)(a).
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- (6) Di bawah Perintah Pengangkutan Melalui Udara (Persenilaian Ringgit) 1978, jumlah 250 francs bagi satu kg telah ditetapkan sebanyak RM48. Di bawah peraturan 22(2)(a) Konvensyen Warsaw, liabiliti defendan adalah terhad kepada jumlah bagi RM110,400 hanya berkenaan kargo dengan berat 2,300kg. Yang arif PK khilaf dalam tidak mempertimbang atau membangkitkan peraturan 22(2)(a) Konvensyen Warsaw dan khilaf dalam mengesahkan jumlah RM198,144.16 yang diawardkan oleh Mahkamah Sesyen. Kegagalan membangkitkan peraturan 22(2)(a) adalah tanpa arah yang berjumlah kepada suatu salah arah, menyebabkan ketidakadilan dan campurtangan rayuan. Dengan itu, perintah Mahkamah Tinggi digantikan dengan jumlah RM110,400. Oleh itu, soalan keempat dijawab secara afirmatif.

Case(s) referred to:

- Morris v. KLM Royal Dutch Airlines* [2002] 2 AC 628 (*refd*)
N Balasingam v. Singapore Airlines Ltd & Anor [1993] 1 CLJ 67 HC (*refd*)
Re Deep Vein Thrombosis and Air Travel Group Litigation [2003] 1 All ER 935 (*refd*)
Rolls-Royce Plc v. Heavylift-Volga-Dnepr Ltd [2000] 1 Lloyd's Rep 653 (*refd*)
Sidhu and Others v. British Airways plc [1997] 1 All ER 193 (*refd*)
Wai Wah Enterprises & Eastern Watch Co Pte Ltd v. China Airlines Ltd [1985] 1 LNS 141 HC (*refd*)
Western Digital Corp v. British Airways Plc [2001] QB 733 (*refd*)

Legislation referred to:

Carriage by Air Act 1974, s. 3(1)

For the appellant - Lai Wai Fong; M/s Shearn Delamore & Co
For the respondent - Saw Lip Hean; M/s Saw & Co

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R2-12-254-2005]

Reported by Kumitha Abd Majid

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] In this appeal, parties are described in their respective capacities in the Sessions Court.

A [2] The plaintiff had obtained judgment against the defendant in the sum of RM198,144.16 with interest and costs in the Sessions Court.

B [3] On appeal, the learned Judicial Commissioner (“the JC”) affirmed the Sessions Court judgment.

C [4] The defendant has now appealed to this court as the apex court. According to the parties herein, the questions of law which they are raising herein have not been ventilated in this court before, although they said that the High Court had the opportunity to address these questions previously.

Finding Of Facts

D [5] The trial before the Sessions Court unveils the following facts:

E (1) MAS Kargo, the defendant’s ground-handling agent (defendant’s agent), received from the plaintiff 30 cartons of fresh tuna fish (“the cargo”) in good condition, having been properly packed and neatly stacked on a pallet.

F (2) The cargo was under the care and control of the defendant’s agent. 20 cartons were crushed and damaged, with pieces of the tuna fish strewn all over the floor. Consequently, the damaged tuna fish was unfit for human consumption (the damaged cargo). The defendant had the responsibility to explain but failed to do so. The plaintiff could only bill Kuwatanatoukaimatu Co. Ltd in Japan (the consignee) for the ten intact cartons.

G (3) Defendant’s agent issued a damage report confirming the damage and the forklift marks found on the damaged cargo.

H (4) Subsequently, pursuant to art. 26 of “the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended at the Hague, 1955” (the Warsaw Convention), the plaintiff sent to the defendant a notice of intention (“the notice”) to claim for damages. This led to the plaintiff’s action against the defendant in the Sessions Court and the said judgment entered against the defendant. (a reference hereinafter to an article is a reference to that article in the Warsaw Convention).

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The Defendant's Liability

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[6] Defendant's learned counsel Ms Lai Wai Fong sought to either wholly repudiate or limit the plaintiff's claim. She submitted that:

(1) The defendant's liability, if any, is governed by the Carriage By Air Act 1974 (the Act) and the first schedule thereto which incorporates the Warsaw Convention, to the exclusion of common law;

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(2) The defendant did not cause any damage to the damaged cargo as it was due to the plaintiff's faulty packaging of the consignment; and

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(3) The consignee is the only person entitled to issue the notice.

[7] In essence, Mr Saw Lip Hean of counsel for the plaintiff supported the JC's decision as legally correct.

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[8] The issues raised in the above submissions may be crystallized into three questions for determination *viz*:

(1) Does the Act read with the Warsaw Convention apply to the facts herein, to the exclusion of common law, more specifically common law causes of action? This is a question of law;

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(2) Whether the defendant or defendant's agent had caused the damage to the damaged cargo? This is a question of fact; and

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(3) Does the plaintiff have the right to issue the notice? This is a question of law.

Governing Law

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[9] In considering this question of law, we are of the view that in relation to the transaction herein, the governing law is the Act read with the Warsaw Convention which has been incorporated as the first schedule thereto. (a reference hereinafter to a section is a reference to that section in the Act). The Warsaw Convention has the force of law under s. 3(1) which merits reproduction as follows:

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A **Convention to have force of law**

3. (1) Subject to this section, **the provisions of the Convention shall**, so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, **have the force of law in Malaysia** in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage. (emphasis added)

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C [10] The carriage of the cargo from KLIA to Japan is an international carriage by air within the definition of art. 1(2). By virtue of s. 3(1), the provisions of the international law contained in the Warsaw Convention shall regulate the rights and liabilities of the plaintiff and the defendant. The carriage comprises the journey during which the cargo was delivered to the defendant's agent for upliftment onboard the defendant's flight until its arrival at the destination to which the cargo was intended, ie, Japan.

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E [11] The answer to this question of law calls for a construction of the governing law, in particular the Warsaw Convention. For the purpose of construing the provisions of the Warsaw Convention as an integral part of international law, we derive invaluable inspirations from other jurisdictions. Lord Hope of Craighead illuminated the judicial trend in *Morris v. KLM Royal Dutch Airlines* [2002] 2 AC 628, 657 [81] HL in the following passage:

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G [81] In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point in issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.

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I [12] With particular reference to the application of the governing law *vis-à-vis* the local law and common law causes of action, we are mindful of the decision of the House of Lords in *Sidhu and Others v. British Airways plc* [1997] 1 All ER 193, which held, *inter alia*, that where a case falls within the terms of the (UK) Carriage

By Air Act 1961, the common law causes of action are all displaced. There, the same law lord, Lord Hope of Craighead, explained that whilst it is tempting to give way to the argument that where there is a wrong there must be a remedy, the domestic courts are not free to prescribe a remedy according to the local law because this would undermine the Warsaw Convention. The enlightening headnote there reads:

Held-Having regard to the objects and structure of the convention, which was to achieve a uniform international code in those area with which it dealt, including the liability of the international carrier, which could be applied by all High Contracting Parties without reference to the rules of their own domestic law, Sch 1 provides the exclusive cause of action and sole remedy for a passenger who claimed for loss, injury and damage sustained in the course of, or arising out of, international carriage by air notwithstanding that that might leave claimants without a proper remedy. Accordingly, where the convention did not provide a remedy, no remedy was available.

[13] Substantially similar sentiments have also been expressed in:

- (1) *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2003] 1 All ER 935, 936 QBD per Nelson J, at Held (2);
- (2) *Western Digital Corp'n v. British Airways Plc* [2001] QB 733, 748 to 750 CA per Mance LJ; and
- (3) *Rolls-Royce Plc v. Heavylift-Volga-Dnepr Ltd* [2000] 1 Lloyd's Rep 653, 657 at para. [22] QBD per Morison J.

[14] The trite principle which may be gleaned from the aforesaid authorities is clear and unambiguous. It is this: in any carriage by air, the provisions of the Act read with the Warsaw Convention govern the transaction in question, to the exclusion of and without reference to the rules of the local law and common law more specifically common law causes of action. We therefore answer the above question of law in the affirmative.

Who Caused The Damage?

[15] In relation to this question of fact, the JC had affirmed the finding of facts by the Sessions Court, ie, the defendant's agent had received the cargo which had been properly packed and stacked on a pallet. On the second day, 20 cartons were found

A to be crushed. Other relevant facts established at the trial had been alluded to above. These facts plainly point to the defendant's responsibility for the damage.

B [16] Given the concurrent finding of facts by the two courts below, in the absence of any failure on the part of the learned trial judge relating to the judicial appreciation of the evidence adduced at the trial, or any indication that the trial court had acted against the weight of evidence, we are not inclined and would indeed decline to disturb that finding of facts. We answer this question of fact in the affirmative.

Is The Plaintiff Entitled To Issue The Notice?

D [17] This question of law turns on the construction of the words "the person entitled to delivery must complain to the carrier" in art. 26(2). In our view, in the context of the carriage by air in the instant appeal, the person who "must complain to the carrier" is "the person entitled to delivery". This person who is entitled to delivery is the person who is entitled to lodge the complaint. Such person is either the consignor, ie, the plaintiff who has entrusted the cargo to the defendant's agent, or, alternatively, the consignee who has ordered the cargo from the plaintiff. The consignor and the consignee are the persons who share a common or corresponding entitlement to delivery. The consignor is the sender of goods, while the consignee is the recipient.

F The critically important question is: who has sustained loss, injury or damage as a result of the delivery of the damaged cargo. Such person must perforce be an aggrieved person. The facts are clear in that the consignor, the plaintiff, had sustained loss and hence is an aggrieved person since the plaintiff could only bill the consignee in Japan for ten intact cartons instead of the entire 30 cartons, ie, the cargo which was the subject matter of the consignment. The plaintiff's loss arising from the damaged cargo certainly gave rise to the plaintiff's entitlement to complain and issue the notice under art. 26(2). Our construction of the expression "the person entitled to delivery" is consistent with commercial sense and reflects a practical, pragmatic and sound commercial reality. It would have defied logic were it otherwise. Hence, our answer to this question of law is in the affirmative.

I

Extent Of The Defendant's Liability

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[18] The final issue raised for the defendant was that under art. 22(2)(a) read with the Carriage By Air (Ringgit Equivalent) Order 1978, the plaintiff's claim, if any, is limited to a sum of RM48 per kg and for 2,300 kg of the damaged cargo, the defendant's liability is capped at the total amount of RM110,400.

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[19] The plaintiff responded that the limit under the Warsaw Convention is inapplicable.

[20] The question for determination under this head is:

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Upon a true construction of Article 22(2)(a) read with the Carriage By Air (Ringgit Equivalent) Order 1978, is the Plaintiff's claim limited to RM48.00 per kg?

[21] In our view, there is merit in this issue. The defendant's liability as a carrier is governed by art. 22(2)(a) which reads:

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(2) (a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

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[22] Under art. 22(2)(a), in the case of the carriage of registered cargo, the carrier's (defendant's) liability is limited to a sum of 250 francs per kg unless the consignor has made, at the time when the consignment was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In the instant appeal, the plaintiff did not make any special declaration of interest. In the absence of a "special declaration of interest in delivery at destination" under art. 22(2)(a), there is no basis to invoke the second limb thereof which provides for an exception to the general rule governing the limit of the carrier's liability under art. 22(2)(a): *Wai Wah Enterprises & Eastern Watch Co Pte Ltd v. China Airlines Ltd* [1985] 1 LNS 141 Singapore HC per Lai Kew Chai J. The defendant's liability in the instant appeal is therefore regulated by the limit prescribed in the first limb of art. 22(2)(a).

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- A [23] Within our shores, art. 22(2)(a) was judicially considered in *N Balasingam v. Singapore Airlines Ltd & Anor* [1993] 1 CLJ 67 HC. There, according to the plaintiff, he had handed in a manuscript, 'The Theory of Flight', to the defendant's agent, declaring its value at RM140,000, to be carried by the third party,
- B as first carrier, to Singapore, and from there, by the defendant. The manuscript was uplifted from Ipoh on MH 161 on 6 August 1979, for onward transshipment to London. The defendant's agent agreed that the plaintiff had handed over a parcel to him. But he claimed that after the airway bill had been signed and RM305.17
- C (for insurance premium, airfreight and service charges), had been collected, he had told the plaintiff to get the KPW3 form, which was required for exports exceeding RM5,000, from the bank. The plaintiff had then left with the manuscript, later coming back to get the airway bill, claiming that the bank needed to put their
- D stamp on the airway bill to state that KPW3 form had been declared. He was supposed to have returned in the afternoon, but had not done so. The defendant's agent claimed that he did not book the cargo space on the third party's aircraft. An officer of the third party claimed that the plaintiff had tried to send a parcel
- E by MH 161, an earlier flight, instead of that as scheduled, by MH 125, but had been told he could not do so, though the cargo manifest of MH 161 showed that the parcel had been uplifted. Abdul Malek Ahmad J (later PCA) held:
- F (1) The defendant was not liable. The manuscript was not sent through the defendant's agent. The plaintiff had sent the manuscript himself.
- G (2) The third party too was not liable. There was no concluded contract between the plaintiff and the defendant from which the third party could be held liable, and there was no evidence how the cargo was included in the MH 161 manifest.
- H (3) If, however, the defendant or third party were to be liable, the plaintiff's claim will be governed by the Carriage By Air Act 1974, and he would be entitled to RM96, as there was no evidence that a supplementary sum, as required by the Act if the declared sum is to become payable, had in fact been paid.
- I [24] Held (3) of the aforesaid judgment of the High Court is of singular significance in relation to the instant appeal. Although the judicial view expressed therein is merely an *obiter dictum* as the

defendant and the third party therein had been held not liable, it is nevertheless of immense importance to the question under consideration herein. The *obiter dictum* clarifies the cap under art. 22(2)(a) which expressly provides for the limit of the carrier's liability, if established. We are in entire agreement with the *obiter dictum* which reflects the correct construction to be applied to art. 22(2)(a) read with the Carriage By Air (Ringgit Equivalent) Order 1978.

[25] Reverting to the mainstream of this appeal, we note that under the Carriage By Air (Ringgit Equivalent) Order 1978, the sum of 250 francs per kg has been fixed at RM48. Under art. 22(2)(a), the defendant's liability is limited to the sum of RM110,400 only in respect of the cargo weighing 2,300 kg, computed below:

$$2,300 \text{ kg} \times \text{RM48 per kg} = \text{RM110,400}$$

[26] With the utmost respect, the JC had erred in omitting to consider or invoke art. 22(2)(a) and had erred in affirming the sum of RM198,144.16 awarded by the Sessions Court. This omission to invoke art. 22(2)(a) is a non-direction amounting to a misdirection, thereby occasioning a miscarriage of justice warranting appellate intervention which we hereby do. Our answer to the above question is in the affirmative.

Conclusion

[27] For reasons adumbrated above, we allow this appeal in part, set aside the aforesaid order of the high and substitute it with a sum of RM110,400 with interest from the date of the Sessions Court judgment to the date of realisation.

[28] As the instant appeal is only allowed in part, the position of the parties are actually put in equilibrium. Hence, we make no order as to costs here and in the High Court.

[29] Deposit to be refunded to the defendant (appellant).

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